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September 6, 1995

URGENT LITIGATION MATTER

Via Telecopy and First Class Mail

Peter Raack, Esq.
Assistant Regional Counsel
United States Environmental Protection Agency
345 Courtland Street, NE
Atlanta, GA 30365

Re: **Carrier Air Conditioning Site; Collierville, Tennessee**

Dear Mr. Raack:

This letter responds to an August 17 letter addressed to you by Ralph T. Gibson, Esquire, counsel for Norfolk Southern Railway Co., in response to concerns about the railroad's and Hill Bros. Construction Co.'s proposed crushed stone operation that I presented in my July 26 letter to you.[1/] Please make this letter and its attachments a part of the administrative record for this site.

On the one hand, it is encouraging that the railroad has now begun to consider the serious issues that Carrier has raised about the environmental aspects of a possible crushed stone transshipment operation.[2/] While Carrier does not agree with the railroad's characterizations or conclusions, the second half of the railroad's letter addresses each of Carrier's nine demands

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1/ The copy of the railroad's letter received by my office on August 21 was not signed. I trust that the final letter sent to you was signed.

2/ On July 18, 1995, Hill Bros. Construction Co. informed Norfolk Southern that it would no longer pursue operation of a crushed limestone transfer site at the Collierville plant. We received that letter from Hill Bros. after my July 26 letter was sent. We enclose a copy of the July 18 letter. Mr. Gibson's August 17 letter notes the Tennessee Chancery Court request for $1 million in environmental protection and Superfund site restrictions as key reasons for that decision. While the letter also states that part of the track "appears to be on Carrier's property," Hill Brothers did not indicate that this decision was made "because it risks being ejected from the property."

presented in my July 26 letter to you, and we are encouraged by this responsiveness. In response to Carrier's concerns, the railroad has suspended its proposed stone operation and is evidently considering drastically scaling it back to avoid the need to comply with otherwise applicable permit requirements. Carrier is further encouraged that the railroad has finally begun to consult with state and local environmental agencies. We had hoped that such consultation had already taken place before the railroad filed suit. In any event, we applaud the railroad's current position that the stone operation is on hold, and that consultation with federal, state, and local authorities is appropriate before the railroad and Hill Bros. present a final proposed plan.

On the other hand, Carrier strongly disagrees with the railroad's characterization that Carrier is "putting up a smoke screen" by raising issues about the railroad's and Hill Bros.' possible interference with the ongoing Superfund cleanup and the potential environmental impacts of the stone operation. In fact, what Carrier has sought to accomplish is to require that the railroad define to Carrier's and EPA's satisfaction the details of the proposed stone operation, and to agree to terms that safeguard the interests of EPA and Carrier while the railroad and Hill Bros. develop what should be a profitable joint venture involving Carrier property.

We also object to the heavy-handed and adversarial approach taken by the railroad while Carrier has attempted to negotiate an agreement that will protect Carrier's and EPA's interests and allow the railroad to accomplish its purposes. The railroad's letter states repeatedly that in order for the stone operation to proceed, this "dispute" must ultimately be "disposed of in Norfolk Southern's favor." Carrier's response is that the environmental issues we have raised from the start about the proposed operation, issues which the railroad concedes are legitimate, must be disposed of in favor of ensuring continued compliance with the Unilateral Administrative Order (UAO). This is true regardless of the resolution of the property dispute.

These objections to the railroad's remarks aside, I would like to comment on the railroad's responses to the nine issues raised in my July 26 letter with respect to the terms of any AO that EPA may decide to issue to the railroad and Hill Bros.

1. ***Noninterference with monitoring wells and other remediation equipment.*** The railroad expresses confidence that it would perform the stone operation without causing interference with Carrier's monitoring wells and other remediation equipment. Therefore, it should not have difficulty complying with terms in an AO that prohibits interference by Norfolk Southern or Hill Bros. with monitoring wells and other remediation equipment. Carrier has no objection to Norfolk Southern's suggestion that certain monitoring wells "be painted a bright color so that trucks would be less likely to run over the wells."

2. ***Construction and operation plans***. Carrier applauds the railroad's promise that there will be no deviation from the final construction and operation plan after initiation of activity at the site. The railroad's letter, however, mistakenly suggests that the plan is fully defined. In fact, the railroad still has not presented a final site construction and operation plan. Mr. Gibson's July 18 letter to you outlined a plan involving the transshipment of as much as 300,000 tons of crushed limestone over a period of up to three years. In his August 17 letter, however, Mr. Gibson attaches a letter from the Memphis and Shelby County Health Department that requires the transloading operation to be limited to "100,000 tons of limestone over a period not to exceed two years." Clearly, the railroad must reduce to a single writing the proposed terms of its construction and operation plan. Furthermore, this plan must be presented consistently to all government agencies -- federal, state, county, and local.

3. ***Stormwater discharge requirements***. Carrier appreciates the railroad's efforts to ensure compliance with applicable stormwater discharge requirements, an issue raised in my July 13 letter to you. According to the railroad's "Exhibit A," a letter from an environmental specialist with the Tennessee Department of Environment and Conservation (DEC), the railroad made an inquiry about applicable stormwater rules on July 21, 1995. While the letter from DEC indicates that a stormwater discharge permit may not be required for the railroad, it does not address Hill Bros.' proposed activities at the site. Those activities may require filing of a stormwater Notice of Intent, since the transshipment operation may cause at least five acres to be "cleared or disturbed," including the haul road.

4. ***Air pollution requirements***. The railroad concludes that an air pollution permit will not be required for this operation, based on a letter sent by an official of the Memphis and Shelby County Health Department ("Exhibit B") in response to a request for guidance which Mr. Gibson submitted on August 4, 1995. As is made clear in the county's letter to Mr. Gibson, now a part of the administrative record, compliance will require the railroad and Hill Bros. to reduce the original transloading plan to 100,000 tons of stone over two years. We trust that the railroad's final plan, if any, will address the airborne particulate issue which Carrier raised and which the county suggests may be minimized through transloading wet limestone. Presumably some sort of shower system will need to be installed to keep the stone wet during unloading.

The county's letter to Mr. Gibson, however, only addresses the unloading of limestone from rail cars into trucks, and does not consider the particulates that may be generated during the transshipment of stone by Hill Bros. Any final construction and operation plan must address the likely increase in airborne particulates caused by Hill Bros. trucks stirring up dust on the spur track and adjacent roads.

5. ***Accident insurance***. Norfolk Southern gives no indication of its intent to comply with bonding or environmental impairment liability insurance requirements if the project moves forward, an issue that is essential from Carrier's standpoint. The railroad instead directs EPA's attention to Hill Bros.' commercial general liability policy that is reportedly in effect at this site. The railroad merely has offered verbal commitments to be liable for its own negligence.

6. ***Indemnity***. Norfolk Southern takes the surprising position that rather than having the railroad agree to indemnify EPA or Carrier against damages that may be caused during the operation, EPA and Carrier should prepare to sue the railroad and Hill Bros. under a theory of common law negligence. While it is clear from recent events that the railroad has no reluctance to use the Tennessee court system in trying to dispose of matters in its favor, it is irresponsible for the railroad to suggest in writing that the United States Goernment and Carrier should prepare to file a lawsuit rather than expect to be indemnified for any possible damages arising from the railroad's or Hill Bros.' exploitation of the site. The indemnity provision is one which Carrier feels must be a part of any final order.

7. ***Record preservation***. Since the issues of air and water permit requirements are not settled (see responses to items 3 and 4 above), the matter of permit record keeping cannot yet be addressed. Even if permits are determined not to be required, preservation of records may still be an important element for EPA to include in any AO. Indeed, the county's letter to Mr. Gibson states that records must be maintained to demonstrate compliance with air pollution requirements even where no permit is required.

8. ***Advance notice of soil sampling***. The railroad states that it has no intention of conducting further soil sampling at the site. Nevertheless, Carrier believes that terms providing for advance notice and split sampling should be included in any AO. Soil sampling may become necessary once such an operation is initiated, such as in the event that the railroad or Hill Bros. causes a spill of hazardous substances at the site.

9. ***Advance notice of groundwater sampling***. While the railroad may have no present intention of conducting groundwater sampling, such testing may become necessary following initiation of the operation, such as if the railroad or Hill Bros. were to cause a release of hazardous substances on the site or contaminate monitoring wells or other sensitive remediation equipment.

Carrier appreciates this opportunity to respond to Norfolk Southern's August 17 letter. We believe it is becoming increasingly clear, given the uncertainty of the railroad's plans for the Carrier site, that issuance of an AO to Norfolk Southern and Hill Bros. offers the best means of protecting EPA's and Carrier's interests at this site.

Thank you for your consideration.

Sincerely,

Russell V. Randle by T.C.D.

Russell V. Randle
Counsel for Carrier Corporation

cc: Ms. Beth Brown
Roscoe Feild, Esq.
Lorna McClusky, Esq.
Ralph T. Gibson, Esq.